

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CABLE NEWS NETWORK, INC.,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

Case No. 1:17-cv-01167-JEB

PLAINTIFF’S RESPONSE TO DEFENDANT’S APRIL 8, 2019 NOTICE

Plaintiff Cable News Network, Inc. (“CNN”), by and through its undersigned counsel, hereby responds to the April 8, 2019 Notice filed by the Federal Bureau of Investigation (“FBI”).

On April 1, 2019, this Court ordered the FBI to “file a Notice indicating whether the completion of the Special Counsel’s investigation permits the Government to release more material from the Archey Declarations and the *ex parte* sealed proceeding.” In response, the FBI agreed to remove certain redactions to the First Archey Declaration and withdraw all of its redactions to the Third Archey Declaration. Notice in Response to the Court’s Order of April 1, 2019 at ¶¶ 2-3, Dkt. 79. As to the *ex parte* proceeding, however, the FBI stated only that “[t]o [its] knowledge, no transcript of this proceeding was ever created,” and “[t]herefore, there are no materials for the FBI to review to determine what portions could be released.” *Id.* at ¶ 4.

CNN cannot reconcile the FBI’s latter statement with the history of the *ex parte* proceeding as reflected in the record. When this Court rendered its decision in the initial round of this litigation, it informed the parties that while the *ex parte* declarations and “sealed, on-the-record *ex parte* session” were not “currently available to Plaintiffs,” those materials “all form[] part of the record that could be reviewed on appeal or in any subsequent litigation.” Feb. 2, 2018

Mem. Op. at 5, Dkt. 49 (emphases added). CNN appealed that ruling, and the Court of Appeals ordered CNN to provide transcripts of the district court proceedings. In response, CNN notified the Court of Appeals in its transcript status reports each month that “in reaching the ruling below, the district court held a ‘sealed, on-the-record *ex parte*’ proffer session with an attorney from the Office of Special Counsel,” explained that “[t]he docket does not show when that session occurred, how it was recorded, or if a transcript can even be ordered,” and proposed that “the FBI should therefore obtain a transcript of the *ex parte* proffer session, if one exists, for the Court.” Transcript Status Reports, *CNN v. FBI*, No. 18-5041 (D.C. Cir.), Dkts. 1722916, 1727081, 1731655, 1736352, 1741095.

During the pendency of the appeal, CNN filed five monthly status reports containing this information. The FBI never notified the Court of Appeals or CNN that no transcript existed.

Moreover, upon remand, this Court ordered the parties to “meet, confer, and submit a joint status report . . . that sets forth whether they believe issues still remain to be decided and, if so, proposes a briefing schedule to resolve them.” Minute Order, Aug. 31, 2018. In response, CNN stated that “[p]ursuant to the common law and constitutional rights of access to judicial records and proceedings,” it “intend[ed] to move this Court to release the two sealed *ex parte* declarations . . . , as well as the record of the ‘sealed, on-the-record *ex parte*’ proffer session.” Joint Status Report at 4, Sept. 13, 2018, Dkt. 66. The FBI stated that it was “prepared to brief” this issue.

Finally, in the sworn declarations that the FBI submitted in support of its motion for summary judgment on remand and its opposition to CNN’s access motion, the FBI’s declarants asserted that their declarations “incorporate[] by reference and supplement[] . . . the sealed on-the-record, *ex parte* proffer of Michael R. Dreeben, Counsel to the Special Counsel,” among

other materials. Fifth Decl. of David M. Hardy at ¶ 5, Dkt. 69-2; Decl. of Michael G. Seidel at ¶ 6, Dkt. 75-1. The FBI's incorporation of that "sealed on-the-record, *ex parte* proffer" cannot readily be squared with its representation in the Notice that no record of the proceeding exists.

The only potential reconciliation that occurs to CNN is that the Court electronically recorded the proceeding, but neither the Court nor the FBI have had that recording transcribed.¹ In any event, CNN notes that its Motion for Access to Sealed Judicial Records expressly asks the Court to unseal "a transcript of *and any other records relating to* the proffer proceeding," Dkt. 72 at 17-18 (emphasis added), including any electronic recording or other record of what transpired in that proceeding. As the FBI has raised no objections to that relief, CNN respectfully requests that the Court release this record now.²

Dated: April 11, 2019

Respectfully submitted,

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¹ CNN respectfully submits that a brief chambers conference would provide clarity and ensure the parties and the Court are on the same page as to the identification of all Sealed Records.

² Should the Court decline this aspect of CNN's Motion for Access, CNN respectfully requests that the Court make plain in the public record precisely what remains sealed in "the record that could be reviewed on appeal or in any subsequent litigation," Feb. 2, 2018 Mem. Op. at 5, Dkt. 49, including any form of record of the proceeding that the FBI and Office of Special Counsel held *ex parte* with the Court.